Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 7

LESTER GUNN, *et al.*,

Appellants,

—v.—

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, *et al.*,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Opinion Below

This is an appeal from the Opinion and Judgment of the District Court for the Western District of Texas, Waco Division, holding that Appellees are entitled to declaratory and injunctive relief against Article 474 of the Texas Penal Code. That Opinion and Judgment are reported at 289 F. Supp. 469 (1968) and are reproduced in the Joint Appendix at page 81. An Addendum Opinion subsequently issued is also reported at 289 F. Supp. 469 and reproduced in the Appendix at page 108.

Jurisdiction

The initial opinion below was filed April 10, 1968. A Notice of Appeal was filed May 6, 1968. The Addendum Opinion of the district court was filed on May 31, 1968. The Jurisdictional Statement herein was filed on July 3, 1968, and jurisdiction was noted on October 14, 1968. Jurisdiction of this appeal is conferred on this Court by Title 28 U. S. C., Section 1253.

Statutes Involved

Article 474, Texas Penal Code:

> "Whoever shall go into or near any public place or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200.)."

Statement of the Facts

The following salient facts were either omitted from or insufficiently developed in the Appellants' brief:

The University Committee to End the War in Viet Nam is an unincorporated association of residents of Austin, Texas, and its environs. The Committee's purpose is "to

protest the conduct of the war in Viet Nam by means of discussions, publications, demonstrations, and non-violent direct action . . . ." (Appendix Opinion, p. 81.)

On the occasion at issue, the appellees, members and friends of the University Committee,[1] appeared at Central Texas College,[2] where President Lyndon Johnson was to speak, to silently, and by carrying signs, protest the government policy in Viet Nam. (See Appendix, Complaint, p. 7.) As appellants correctly note, on the day in question, appellees arrived at the College, chose their protest signs, and proceeded to move toward the crowd listening to the speaker (Appellants' Brief, p. 4). An "air of hostility" developed and "(s)everal uniformed soldiers attacked the group of protesters and tore up their signs" (Appellants' Brief, pp. 4-5). One of the marchers, as a result of the attack, was bleeding at the mouth (Appendix, p. 46), another was "struck to the ground" (Appendix, p. 53), another was "boxed . . . in the right ear" and his arms were "pinned back . . . so that someone else could hit him" (Appendix, p. 59). The protest signs were completely destroyed (Appendix, pp. 46, 53, 59, 65, 79). Several of the demonstrators were manhandled by the arresting authorities on the scene

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[1] Uncontradicted affidavits put their number at approximately seven persons arriving in two cars (Appendix, pp. 40, 45, 52, 58, 63, 64).

[2] The criminal charges were dismissed subsequent to the filing of this action on the ground that the alleged offenses had occurred on a federal enclave, to which criminal jurisdiction had been ceded by the State of Texas. The events in question occurred on the grounds of Central Texas College. If such grounds are in fact on a portion of land comprising Fort Hood Reservation there is no support whatever in the record for that allegation.

(Appendix, pp. 41-42, 53, 60). Those not arrested were ordered to leave[3] (Appendix, pp. 60, 66, 71).

There is one critical factual omission which must by now be evident. The appellants at no time have ever alleged that the appellees did anything other than walk toward the crowd while *silently* carrying signs. There is not a single shred of evidence that appellees, prior to the attack upon them by the soldiers, ever spoke at all, not to mention that they never spoke in a "loud and vociferous, or obscene, vulgar, or indecent" manner. Indeed, appellants squarely state at page 11 of their Brief, "The arrests were not as a result of anything *said* by appellees, but were based solely on their *conduct*." (Emphasis added.)

The evidence adduced by the State, in its most specific form, alleges that the sheriff "was standing on the steps of the speaker's platform, when a policeman from Killeen came by and told me there was some trouble over on the edge of the crowd" (Appendix, p. 71). The Sheriff's affidavit continues, "I went over there but by the time I got there, a car was driving off which I understand contained

[3] Appellants have suggested that "military police arrested the three named plaintiffs" (Brief for Appellants, p. 5). Military police neither undertook to "arrest" them, nor turned them over to the sheriff of Coryell County. Rather, one Bell County deputy and a state game warden helped a Killeen policeman handle one appellee (Fletcher's Affidavit) and the other two were held by unidentified officers and led to a car (Butler's Affidavit); when all three had been handcuffed and "frisked" they were put in "a fish and game commission car" and a state game warden and Bell County deputies "took the men to the Killeen police station and turned them over to the Killeen authorities" (Fletcher's Affidavit). When another Bell County deputy sheriff learned that events had occurred in Bell County, on direct orders from Bell County Sheriff Lester Gunn, he filed complaints charging disturbing the peace (Strange's Affidavit).

at least two of the people against whom complaints were later filed" (Appendix, p. 71). He added:

> I did not have the names of any witnesses but was told that they had gotten into a squabble with some soldiers and Military Police and had refused to leave and that one of them had *either yelled or had a sign* saying something to the effect that "Hitler's better than this" or "I like Hitler better"[4] (Appendix, p. 72).

The opinion below assumed the facts to be as has above been detailed (Appendix, p. 83). The Court below held:

> "We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements."

The University Committee, its friends and supporters, continue to desire to make known their protest against the war by "discussions, publications, demonstrations and non-violent direct action" (Appendix, pp. 7, 42-43, 49, 56, 60-61,

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[4] Affiant John E. Morby was carrying a sign which showed the following quote by Vice-Marshal Ky: "I have only one idol Hitler" (Appendix, p. 41). Other signs contained quotes from U Thant and General Shoup.

66). So long as the threat of enforcement of Article 474 of the Texas Penal Code exists, they are afraid and therefore unable to do so (*Id.*, at pages noted).

Summary of Argument

This case brings before the Court a challenge to the fundamental principle of primary federal responsibility for the enforcement of basic federal, constitutional rights. Appellants have challenged the jurisdiction of a federal district court called upon to protect such rights. The court below has simply held that a case or controversy has been brought before it for consideration. No final relief—of any kind—has been ordered below, thus the questions of the appropriateness of the remedy to be ordered, raised by appellants herein, are premature.

The existence of a case or controversy positing jurisdiction in the district court is undeniable under this Court's rulings in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Zwickler* v. *Koota,* 389 U. S. 241 (1967); and *Epperson* v. *Arkansas,* 37 L. Wk. 4017 (November 12, 1968). The holding below, that the disturbing-the-peace statute of the State of Texas was overbroad, creating a chilling effect on First Amendment rights, was determined within the context of an existing controversy and was thus properly the subject of judicial review.

The prosecutions in this action were commenced under authority of a statute so overbroad and vague on its face that in controlling activity which may be regulated consistent with constitutional safeguards, it "sweep(s) unnecessarily broadly and thereby invade(s) the area of protected freedoms." *NAACP* v. *Alabama ex rel. Flowers,*

377 U. S. 288, 307 (1964); *Zwickler* v. *Koota*, 389 U. S. 241 (1967). Appellants' attempt to forestall any judicial consideration of this statute and its application by summarily dismissing the charges without in any respect disavowing the intent to prosecute under the statute in the future, does not abate the "chilling effect" upon appellees' exercise of First Amendment rights to which the initiation of prosecution gave rise. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Zwickler* v. *Koota, supra; Carmichael* v. *Allen*, 267 F. Supp. 985 (1967); *Harris* v. *Younger*, 281 F. Supp. 507 (1968). This Court is urged to consider the appellants' allegations of mootness and facial constitutionality in the context of the special reasons underlying exercise of federal jurisdiction.

POINT I

The federal District Court below had jurisdiction to hear and determine this matter.

A. *Appellees' complaint brought before the District Court below a case or controversy over which the court clearly had jurisdiction.*

At the center of appellants' position is the argument that the court below had no jurisdiction due to a lack of a case or controversy having been presented. This position totally misconceives this Court's view of the elements of a case or controversy in the First Amendment area. Only this Term, the Court has again explained its ruling in that regard in *Epperson* v. *Arkansas*, 37 L. Wk. 4017 (November 12, 1968). Presented with "at least a literal dilemma", the plaintiff in *Epperson* sought declaratory and injunctive relief against possible, but in no manner "threatened", future prosecutions which she feared would

result if she taught about evolution in the State's public high school. 37 L. Wk. at 4018. As this Court noted in regard to plaintiff's fear of prosecution, "There is no record of any prosecution in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States." 37 L. Wk. at 4018. As Justice Black, concurring, noted, the State indicated it would make no attempt to enforce the law; the teacher-plaintiff had discontinued teaching; the textbooks containing material on evolution were still being utilized and there was no evidence to show that the material contained was not being taught. 37 L. Wk. at 4021. Despite the highly attenuated nature of the controversy there presented, however, this Court considered the case on its merits. The instant matter, presenting a substantially more serious and immediate controversy, must therefore be considered ripe for judicial review.

In *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), this Court held that "the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purposes of discouraging protected activities." 380 U. S. at 489-90. This case brings before the Court a situation wherein the "first branch" of *Dombrowski* is challenged, to wit: a case wherein a statute is attacked on its face as abridging free expression.[5]

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[5] The court below specifically declined to reach the issue of unconstitutional application. It is submitted, however, that "the record is . . . totally devoid of support for the State's claim" that appellees spoke at all, much less loudly or vociferously, cf. *Cameron* v. *Johnson*, 390 U. S. 611 (1968), Statement of Facts, *supra*. The invocation of Article 474 in such circumstances is evidence of, at the very least, the State's total disregard for constitutional safeguards for regulation of speech, and, it is submitted, of an ever-present threat of future use of the statute to harass appellees in the exercise of First Amendment rights.

The scope of federal power to grant relief in such a case was explained in *Zwickler* v. *Koota*, 389 U. S. 241 (1967). In *Zwickler*, this Court held that ". . . a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute." "Escape" from the exercise of federal jurisdiction to grant declaratory relief is sanctioned ". . . only in narrowly limited 'special circumstances' *Propper* v. *Clark*, 337 U. S. 472, 492 (1948)." In sum, the appellees have attacked a state statute as overbroad, and vague, in violation of rights of free expression, and, absent special circumstances, appellees are entitled to declaratory relief.

It must be re-emphasized that no question is now properly raised as to the precise form of federal remedy which may be granted.[6] Rather the court below considered the issue of whether a case or controversy, positing federal jurisdiction had been presented.

> "Defendants contend that the case is now moot for the reason that 'no useful purpose could now be served by the granting of an injunction to prevent the prosecution of these suits because the same no longer exists'. *It appears, in other words, that defendants' motion to dismiss is addressed to that part of the plaintiffs' complaint which seeks an injunction against the prosecution of the criminal charges in Bell County.* We are clear that that part of plaintiffs' prayer is no longer

[6] The court below stayed its mandate pending corrective action by the State legislature. Subsequent to the issuance of the district court's order, the legislature met and took no action in regard to Texas Penal Code, Article 474.

before us. But we cannot fail to understand that, just as in *Dombrowski* v. *Pfister,* 380 U. S. 479, 483-492 (1965), and *Zwickler* v. *Koota,* 389 U. S. 241, 253-254 (1967), more is involved where the prayer for relief also requests a declaratory judgment that the statute under which the criminal charges were brought is unconstitutional on its face for being overly broad.

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With this background, how then do we evaluate the defendants' argument that inasmuch as the state charges have been dismissed, the record is bare, there is no 'case or controversy', there is nothing useful which can be accomplished. Of course, it ignores the reality that plaintiffs' prayer includes the request for a declaration that the statute is unconstitutional on its face. It ignores the notion, introduced in *Dombrowski* and reiterated in *Carmichael,*[1] that the statute's simple presence on the books (which is what the plaintiffs are attacking) may have the requisite 'chilling effect' on constitutionally protected behavior to warrant close judicial scrutiny. It even ignores that at least twice in the area of First Amendment rights, the United States Supreme Court has felt compelled to decide the constitutionality of state statutes where no state criminal charges thereunder were pending. We therefore overrule Defendants' Motion to Dismiss, and proceed to a consideration of the merits." Appendix, pp. 84-85, 88. (Emphasis added.)

The court below correctly pointed out that the absence of presently pending criminal charges does *not* defeat federal jurisdiction to grant at least declaratory relief where

[1] *Carmichael* v. *Allen,* 267 F. Supp. 985 (1967).

a chill on First Amendment activity persists due to the existence of the infirm statute on the books.[8]

The high-water mark of decisional law on this issue was reached in *Zwickler* v. *Koota*, 389 U. S. 241 (1967). The plaintiff in that action was tried and acquitted on state charges relating to distributing anonymous handbills which criticized a candidate for public office. Subsequent to his acquittal, he filed a federal action for declaratory and injunctive relief against future enforcement of the statute alleging "his intention and desire to distribute in the future . . . the anonymous leaflet he distributed in 1964." 261 F. Supp. 985 (1966). The plaintiff further alleged that as the prosecutor was a "'diligent and conscientious public officer'", 261 F. Supp. at 988, he would prosecute plaintiff for similar activities in the future. "He (the plaintiff) regards this presumption as 'the threat of prosecution' . . ." giving immediacy to his action. 261 F. Supp. at 988.

This Court, when the case was first before it for review, did not affirm the order of the district court in *Zwickler* dismissing the action. Despite the fact that plaintiff had

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[8] The court below found as follows:

"Is there then the requisite 'chilling effect' here? The sworn evidence in support of the plaintiffs' prayer for relief indicates that these men have ceased efforts to carry out the purposes and objectives of the University Committee for fear of sanctions under the statute which is presently attacked, that they have 'postponed further expression of (their) views through peaceful, non-violent activities lest (they) be arrested' for disturbing the peace. This in itself demonstrates a broad curtailment of activities which may include, and (as discussed in Point II) do include, protected behavior. Not only, as in *Carmichael, supra*, at 994, can the presence of this statute cause a person to 'pattern his speech with the ever present threat' of sanctions; here, it appears to have induced suspension of expression altogether" (Appendix, pp. 87-88).

been acquitted and absent *any* overt, affirmative threat by the prosecutor of future enforcement, this Court remanded the case for new proceedings below.

The court on remand in *Zwickler*, 290 F. Supp. 244 (1968), Docket No. 370, Jurisdiction Noted, October 15, 1968, ruled that the controversy was ripe where a statute that had not lapsed into desuetude, cf. *Poe* v. *Ullman*, 367 U. S. 497 (1961) had an inhibitory effect on First Amendment freedoms, 290 F. Supp. at 246-247. The court held that:

> "*When the action was initiated* the controversy was genuine, substantial and immediate.[9]
>
> * * * * * *
>
> Zwickler's complaint quite properly instances this seminal episode of harassment as illustrative of the impact upon him of an overbroad statute and as giving substance and immediacy to the threat of future inhibitory action. . . ." 290 F. Supp. 248, 249 (emphasis added).

The result in the instant case should flow, *a fortiori*, from this Court's decision in *Zwickler* given the critical factual differences between the matters set forth below:

i) The plaintiff was acquitted on the criminal charges in *Zwickler*. His conduct, if repeated, would most probably yield the same result or would not be actionable

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[9] Defendant in *Zwickler* attempted to moot the controversy by pointing out that the candidate criticized by Zwickler in the handbill had become a state judge so that the plaintiff's allegation that he desired to distribute in the future the leaflet he distributed in 1964, would be rendered null and void and of no effect. The district court refused to so find. 290 F. Supp. at 248.

at all. The plaintiffs in this action have no such assurance whatever. They were not given the opportunity of receiving any judicial hearing on their charges before those charges were dropped for reasons having nothing to do with the substance of the statute or their culpability or lack thereof.

ii) The "threat" of continued enforcement alleged in *Zwickler* was the bald assertion by plaintiff that the prosecutor, being "diligent and conscientious", would of course have to bring charges against plaintiff for future leafletting activity. 261 F. Supp. at 988. In the instant case, plaintiffs were threatened and harassed by the sheriff and his assistants (see Affidavits, Appendix, pp. 51-67), and were literally put in fear of future arrest to the extent that they have ceased all peaceful protest activity. See Opinion Below, Appendix, pp. 87-88.[10]

It is thus clear that the district court below was correct in ruling that the attempt of the State to moot the entire case must fail because this Court taught in *Zwickler* that

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[10] As the Court below noted, in *Carmichael* v. *Allen, supra*, the district court held that absent *specific disavowals* by the prosecutor of an intention to invoke the challenged statute in the future, equitable relief was both necessary and appropriate. 267 F. Supp. at 994. In another case in the Fifth Circuit, *Ware* v. *Nichols*, 266 F. Supp. 564 (1967), Circuit Judge Wisdom, concurring in the granting of declaratory relief also would have granted injunctive relief, stating, ". . . the fact that the State brought these *present* prosecutions, justifies an injunction against *future* prosecutions directed against the agents or persons similarly situated." 266 F. Supp. at 569. The criterion proposed by Circuit Judge Wisdom is rather like that in *Zwickler* wherein the initial arrest is viewed as a "seminal episode", 290 F. Supp. at 249, indicative of future intent.

the mere absence of pending criminal proceedings cannot in and of itself defeat federal jurisdiction. Particularly in this case, where the federal action was begun as soon as state charges were filed, where the state charges were dismissed for reasons having nothing to do with the culpability of appellees or the merits of the statute, and where intimidation by the State officials has caused appellees to suspend all peaceful protest activity, appellees are entitled to federal relief.

The decision of the court below was clearly in line with all, including the most recent, precedents of this Court. Appellees assert that the court below was further correct in suggesting that they are entitled to declaratory and injunctive relief in the absence of remedial legislative action. However, no specific relief has yet been granted. Thus at this time this Court is urged merely to affirm the decision of the court below as to its jurisdiction, and remand this matter for further proceedings consistent with the decision below.

B. *Upon remand, appellees will urge the court below to separately consider granting declaratory and injunctive relief to which appellees have been held to be entitled.*

Despite the prematurity of the argument, appellants seek to cast doubt upon the district court's statement that injunctive relief may be appropriate. At the outset, it is critical to note that the question of granting injunctive relief does not affect, as appellants have not truly challenged, the propriety of granting declaratory relief. *Zwickler* v. *Koota, supra.* Their argument relating to *Cameron* v. *Johnson,* 390 U. S. 611 (1968), must of necessity be

viewed as irrelevant to the question of whether declaratory relief is available when a statute limiting expression is held overbroad on its face. As appellees will demonstrate in Point II, *infra*, the court below was correct in holding Article 474 facially unconstitutional. The treatment by appellants of the need for injunctive relief against this facially unconstitutional statute, however, is wholly incorrect.

As noted at the outset, this case presents the first branch of *Dombrowski* for the Court's consideration. The statute herein has been held to be "impermissible and unconstitutionally broad". (Opinion Below, Appendix, p. 92.) As the district court below stated:

> "This case does not involve in any way an appraisal of the constitutionality of the application of the statute to the plaintiffs; we do not evaluate whether Article 474 was constitutionally applied to these plaintiffs' activities. Our sole concern is the determination of whether Article 474 on its face is, as plaintiffs argue, constitutionally defective as being overly broad" (Appendix, p. 89).

There is a critical difference between the two branches of *Dombrowski* as evidenced by this Court's ruling in *Cameron* v. *Johnson*, 390 U. S. 611 (1968). In *Cameron*, the Court considered the problem of allegedly harassing prosecutions undertaken pursuant to a statute *not* unconstitutional for overbreadth on its face. In so doing, the Court established certain criteria for determining whether arrests and prosecution were undertaken and pursued un-

der a valid statute for the purpose and with the effect of discouraging exercise of federal rights. Those criteria do not control this case.[11]

Appellants have confused the two branches of *Dombrowski* and its progeny. Appellants, at p. 11 of their Brief, state:

> "Absent threat of future arrest and absent a showing of a concerted plan to harass Appellees by state officers, Appellants urge that the instant case should be governed by the rationale and holding expressed by this court in *Cameron* v. *Johnson*, 390 U. S. 611 . . . "

The proposition relied upon by Appellants is taken from the opinion of Justice Fortas dissenting in *Cameron* and is noted as follows, also at p. 11 of Appellants' Brief:

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[11] Had the court below reached this issue, appellees submit that it would have found the statute unconstitutional as applied and invoked for purposes other than the good-faith administration of the criminal law. There is virtually no evidence to support the State's charges. Cf. 390 U. S. 611 (1967). This factor added to the intimidation of appellees which occurred at their arrests and the summary dismissal of the charges prior to hearing lend weight to the conclusion that further arrests of appellees under this statute for peaceful silent protest activity must be foreclosed.

There is further the astounding effort of the State, made on Motion for a New Trial to suggest that appellees were not charged with Article 474 at all. "Nowhere can the Court demonstrate that any charge was made that the plaintiffs or any of them used loud and vociferous language in any manner" (Appendix, p. 101). This attempt by the appellants, in bad faith, to escape proper judicial review, was met as follows in the court below: "In the Agreed Statement of Facts and Stipulations, filed with the official papers in this cause, Plaintiffs and Defendants agreed that the individual plaintiffs 'were charged with disturbing the peace in violation of Article 474' ". Issue having been joined on that question, and *no other* disturbing the peace statute appearing at all in the Texas Penal Code, the district court proceeded to label the State's unconscionable effort to forestall judicial consideration as "without merit" (Appendix, pp. 108-109).

> "I agree that the statute in question is not 'unconstitutional on its face'. But that conclusion is not the end of the matter. *Dombrowski* stands for the proposition that 'the abstention doctrine . . . is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression, or as *applied for the purpose of discouraging protected activities*.'" 380 U. S. at 489-490. (Emphasis added.)

Unhappily, appellants have emphasized precisely that portion of the *Dombrowski-Cameron* theory that is not at issue here. Appellees need not show "a course of conduct by Appellants . . . whereby any of Appellees . . . was . . . subjected to systematic enforcement of Article 474 to prohibit free expression" (Appellants' Brief, p. 10). Appellees have shown that they were arrested under a state statute overbroad on its face abridging free expression and that reasonable and well-founded fear of subsequent arrests under that statute has caused them to cease their exercise of First Amendment activity.

It is clear that appellees have presented a case or controversy within the meaning of the decisions of this Court, *Epperson* v. *Arkansas, supra; Zwickler* v. *Koota, supra; Dombrowski* v. *Pfister, supra;* and therefore that the court below had jurisdiction, and the motion to dismiss was properly denied. Appellees assert that the issuance of declaratory and injunctive relief will likewise be appropriate at an appropriate time, to wit, on remand to the court below.

Accordingly, it is urged that this Court affirm the decision below and remand this action for further proceedings in accord with the decision below. At that time, any questions as to the propriety of injunctive relief may be addressed to the three-judge court.

POINT II

Article 474 of the Texas Penal Code is unconstitutional on its face.

The Court below addressed its consideration on the merits solely to the question of the facial constitutionality of Article 474 and held ". . . . that Article 474 is impermissibly and unconstitutionally broad." Appendix, p. 92.[12] The Court below also held that ". . . it is our opinion that Article 474 must be added to the list of statutes which 'leave to the executive and judicial branches too wide a discretion in the application of the law.' It 'leaves wide open the standard of responsibility' relying on 'calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se.'. For this additional reason, Article 474 is vulnerable to constitutional attack." Appendix, p. 92. It is within the context of these pronouncements that appellees examine Texas Penal Code, Article 474.

A. *The double infirmities of overbreadth and vagueness are particularly problematic in disturbing the peace statutes.*

Article 474 is significantly different from many statutes at issue in earlier vagueness and overbreadth cases in that the two vices compound each other in this statute. Perhaps it is this rather unique nature of Article 474 that causes the State to confuse the concepts of vagueness and overbreadth and in its presentation in brief to discuss them

[12] As the court below stated, "Our inquiry deals with the overbreadth attack as it relates to the part of the statute which prohibits the use of 'loud and vociferous'. . . language . . . in a manner calculated to disturb the persons present.'" Appendix, p. 89.

almost interchangeably. Certainly the State errs in asserting that the opinion of the three-judge court "limited its concern to the determination of whether the statute was constitutionally defective on its face as being overly broad," Appellants' Brief, p. 13. For clearly the court struck down Article 474 on both counts: " . . . the statute on its face makes a crime out of what is protected First Amendment activity" (Appendix, p. 91), and " . . . Article 474 must be added to the list of statutes which 'leave to the executive and judicial branches too wide a discretion in the application of the law' " (Appendix, p. 92). In so doing the three-judge court was but following the guidelines set down by this Court.

In *Zwickler* v. *Koota,* 389 U. S. 241 (1967), the two concepts were succinctly stated and nicely delineated: "Overbreadth" means a regulation "offends the Constitutional principle that 'a governmental purpose to control and prevent activities subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' "; "vagueness" includes that "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

From the inception of this action, appellees have contended that Article 474 is both overly broad and vague; Appendix, p. 18. They assert that it, therefore, is a sort of hybrid, coming within a variety of statutes which combines the two problems by employing imprecise terms to define the outer limits of regulations that may prohibit constitutionally protected activities.

When a statute seeks to cover a variety of activities in a single provision, there is a special danger of overbreadth —i.e. that at least some of the activities covered by the statute will be constitutionally protected. This is particularly true if the statute by its terms deals with speech. Such ambitious legislative undertakings must be drafted with the highest precision—a standard of exactness significantly higher than that required in vagueness cases in which the element of overbreadth is not present. Furthermore, if the enforcement context of the statute is likely to be emotionally charged, the need for precision is even greater.

The three-judge court below was correct in its opinion that Article 474 must be judged against the very highest standards of draftsmanship. For this statute presents a rare congruence of four key elements: 1) It is multi-purpose in that it attempts to cover a wide variety of activities with a single generalized definition; 2) By its terms it is aimed directly at speech, not at conduct which may incidentally involve speech; 3) By its terms it is to be applied in emotionally charged situations; and 4) Its key operative words such as "loud", "calculated", and "disturb" are of the lowest grade of certainty. See E. Greund, "The Use of Indefinite Terms in Statutes", 30 Yale L. J. 437 (1921).

B. *Under standards by which this Court has previously tested breach of the peace regulations, Article 474 is unconstitutionally broad and vague.*

Article 474 purports to inhibit certain conduct which is "calculated to disturb." There is no higher standard of intent such as was found in *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) where language was punishable if "calcu-

lated or likely to provoke another person or persons to acts of immediate violence." Cf. *State* v. *Cantwell,* 126 Conn. 1, 8 A. 2d 533 (1939). Nor does Article 474 contain the standard reviewed in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) where "any act or conduct inciting to violence," 123 S. E. 2d at 249, was made punishable. Yet this Court struck down the offenses as defined in *Cantwell* v. *Connecticut* and *Edwards* v. *South Carolina.* It must then, appellees urge, *a fortiori,* strike down Article 474 of the Texas Penal Code.

The "disturbance" which the Texas statute seeks to avoid is in fact that conduct which may be precisely the subject for First Amendment protection. As the Court below noted, citing *Terminiello* v. *City of Chicago,* 337 U. S. 1, 4 (1949):

> "A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Appendix, p. 90.

Where a statute sweeps unnecessarily broadly and therefore invades the area of protected freedoms as does Article 474, then that statute must be declared unconstitutional on its face. *Zwickler* v. *Koota,* 389 U. S. at 250, *Dombrowski* v. *Pfister, supra, NAACP* v. *Alabama, supra.*

Discretion in enforcement too wide to admit of safe, constitutional strictures was also reviewed by this Court in the context of disturbing the peace prohibitions in *Cantwell* v. *Connecticut,* 310 U. S. at 308, and in *Ashton* v. *Kentucky,* 384 U. S. 195 (1966). *Ashton* represents this Court's most recent discussion of a breach of the peace

regulation and is a dramatic reaffirmation of the unique constitutional difficulties inherent in the concept of such statutes. The holding therein is dispositive.

In *Ashton* the defendant was convicted on a common law crime defined by the trial judge as publishing "any writing calculated to create disturbances of the peace." This Court's opinion on appeal could easily have been written with Article 474 in mind:

> "To make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se.*"

The Court below so held in this case, and this Court is urged to affirm that ruling.

In summary, the cases in which this Court has viewed breach of the peace regulations on their face reveal a consistent pattern. Just as the functional reasons for the vagueness and overbreadth doctrines would indicate, the cases reaffirm that there *is* something unique about breach of the peace regulations. A holding that Article 474 is overbroad and vague would involve no doctrinal step beyond those which have already been taken; such a holding would not require an invalidation of the whole breach of the peace concept. For Article 474 is one of the broadest breach of the peace regulations to come before this Court. Cf. *Cantwell* v. *Connecticut, supra, Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), *Terminiello* v. *City of Chicago, supra,*

Edwards v. *South Carolina, supra, Cox* v. *Louisiana,* 379 U. S. 536 (1965) and *Ashton* v. *Kentucky, supra.*[13]

C. *State court decisions, considered by the Court below, do not sufficiently circumscribe the scope of Article 474 so as to save it from the dual infirmities of overbreadth and vagueness.*

Perhaps the best statement of the State's attitude toward Article 474 is contained in *Ex parte Slawson,* 141 S. W. 2d 609 (Ct. Crim. App. 1940). In response to an allegation that Article 474 is overbroad and vague, the Court of Criminal Appeals upheld the statute without making the slightest attempt to limit its terms:

> "This statute has been in existence for over half of a century and many prosecutions and convictions thereunder have been sustained, and we see no good reason to strike it down, *even if some feature thereof might be held to be uncertain.* There are many acts denounced in said article as a violation of law and good order which are sufficiently certain and definite to make it a good and wholesome statute." (Emphasis added.)

The nebulous term "disturb" need not even be clarified in the charge to the jury:

> "It is unquestionably correct for the court to charge the jury that, if any portion of the people assembled on the occasion referred to were disturbed, it would be a disturbance, within the contemplation of the statute."
>
> *Young* v. *State,* 44 S. W. 507 (1898).

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[13] In none of these previous cases was evidence of deterrence caused by the overbreadth of the statute so clear as on this record. Appendix, pp. 42, 43, 49, 61, 66.

Unlike the Courts in other states,[14] the Texas Courts have made no attempt to narrow the scope of Article 474. *Ex parte Slawson, supra; Woods* v. *State,* 213 S. W. 2d 685, 687; *Head* v. *State,* 96 S. W. 2d 981, 983; *Young* v. *State,* 44 S. W. 507; *Ex parte Trafton,* 271 S. W. 2d 814, 816-817. Confining the offense to "loud and vociferous" sounds (which the statute does not even do; it also prohibits *inter alia* "indecent language") is not an operative narrowing at all, for this Court has made it clear that demonstrations may not be prohibited solely because they are loud. *Edwards* v. *South Carolina, supra* ("singing," "clapping," "stomping of feet"); *Cox* v. *Louisiana, supra* ("loud cheering and spontaneous clapping and screaming and a great hullabaloo").

The court below quite clearly considered the State court rulings on this statute in reaching its determination on the merits. Appendix, pp. 110-113 ("loud and vociferous"), pp. 114-115 ("calculated to disturb"). The three-judge court correctly concluded that "Texas has an overbroad definition of the offense when applied to activities fairly within First Amendment protection," Appendix, p. 112, and that "the quantum of disturbance necessary for violation sweeps within its broad scope conduct protected by the First Amendment," Appendix, p. 115. These conclusions are based on a determination that "the key to understanding the Texas statute is not the meaning of loud and vociferous but the effect, in terms of quantum of disturbance, that the speech had on others." Appendix, p. 115.

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[14] *State* v. *Cantwell,* 126 Conn. 1, 8 A. 2d 333 (1939); *State* v. *Chaplinsky,* 91 N. H. 310, 18 A. 2d 754 (1941); *State* v. *Edwards,* 239 S. C. 339, 123 S. E. 2d 247 (1961); *State* v. *Cox,* 244 La. 1087, 156 So. 2d 448 (1963); *State* v. *Givens,* 28 Wis. 2d 109, 135 N. W. 2d 780 (1965).

The court below, having amply considered state court rulings on Article 474, and those rulings having in no way rehabilitated the statute, properly held it to be overbroad and vague on its face. This court is urged to affirm the holding of the court below.

D. *Appellants have attempted unsuccessfully to rehabilitate Article 474.*

Appellants have attempted to narrow the scope of the statute's proscription as follows:

> "Defendants [appellants] urge that the opinion of the Court [District Court] is contrary to the law and the facts wherein the Court has held that the provision regarding the use of loud and vociferous language would on its face prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. Article 474 only prohibits such language when used at specified times and places. The Court goes on to point out that 'Article 474 prohibits the use of "loud and vociferous language . . . *in a manner calculated to disturb*" the public.' This is erroneous in that Article 474 only prohibits a person from acting in this manner when he goes to a certain place and uses such loud and vociferous language to disturb the persons gathered there. This is vastly different from a statute which simply makes a shotgun prohibition against language which might stir up the public." Appellants' Motion for New Trial, Appendix, p. 102.

The "certain place" to which appellants advert, the element which appellants rely upon as the critical narrowing

factor herein is ". . . into or near any public place, or into or near any private house . . ." It is difficult to imagine many, if any, places which are not encompassed within this formulation. To suggest this as the limiting factor of this statute is merely to emphasize that which is the cause of its infirmity.

Appellants expose the true heart of their argument in setting forth the "legitimate governmental interest" justifying the regulation of expressional activity. Again quoting from the Defendants' Motion for New Trial in the court below:

> "Defendants urge that the Court erred in its opinion by failing to observe as a canon of construction the Preamble to the Constitution of the United States which says, *inter alia*:
>
> > 'We the People of the United States, in Order to . . . insure domestic Tranquility . . . do Ordain and establish this Constitution for the United States of America.'
>
> Defendants urge strongly that any construction of the Texas Disturbing the Peace Statutes must be undertaken with full recognition of the foregoing constitutional provision." Appendix, p. 103.

The court below answered appellants by stating that although Texas clearly has the power to regulate demonstrations, "the power to regulate must be so exercised as not, in attaining a permissible end, to unduly infringe a protected freedom." *Shelton* v. *Tucker,* 364 U. S. 479 (1960). Appendix, pp. 89, 109. Appellants' suggested alternative test of facial constitutionality, to wit, that a

". . . statute is valid, even though its terms are general and imprecise, if its application is not dependent on the content of the speech", Brief for Appellants, p. 13, simply does not meet the strictures laid down by this Court. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Baggett* v. *Bullett,* 377 U. S. 360 (1964); *Zwickler* v. *Koota, supra; Dombrowski* v. *Pfister, supra.*

Appellants suggest that the instant statute should be upheld as consistent with this Court's ruling in *Feiner* v. *New York,* 340 U. S. 315 (1951). Brief for Appellants, p. 16. But *Feiner* did not discuss the issue of the statute's overbreadth for neither at the trial nor before this Court did petitioner ever raise the issue; see Brief for Petitioner, *Feiner* v. *New York,* pp. 6-7, Statement of Issues Raised, Transcript of Record. *Feiner* is simply not an overbreadth precedent, as this Court recognized in *Edwards* v. *South Carolina,* 372 U. S. at 236, and *Cox* v. *Louisiana,* 379 U. S. at 551. The case stands only for the proposition that punishment was held to be permissible in a situation where a speaker refuses repeated requests by police officers to desist because a crowd is blocking sidewalks, becoming unruly and generally presenting a clear danger of disorder.

Appellants also cited this Court's *per curiam* opinion in *Zwicker* v. *Boll,* 391 U. S. 353 (1968). It is clear that *Zwicker* is not a holding on the merits of the Wisconsin disorderly conduct statute but rather is an affirmance of the decision below, 270 F. Supp. 131, which went off on a procedural issue. Only one judge in the *Zwicker* district court stated that the statute was facially valid while an-

other expressly left the issue undecided and a third did not reach the question at all.[15]

This case is unique in its factual setting and in the application of an archaic regulation to the facts presented. In this context, the Court is urged to uphold the right of peaceful, free expression in the face of repressive use of a generalized concept of disturbing the peace, which today's demands suggest is obsolete. For as the court below—a court composed of three experienced judges who are long time residents of the Central Texas area—foresightedly determined (Appendix, p. 111):

> ". . . we have considered the nature of the demonstrations that pervade our society today. The nature of the protest movements has convinced us that while the Texas definitions may suffice for non-first amendment situations, they are inappropriate in the free-speech arena. The modern demonstration involves hundreds of thousands of citizens marching along highways, picketing public accommodations or schools, or conducting mass meetings in parks or other public buildings. Although these projects create problems, the decisions clearly hold that the peaceful expression of views by demonstrations, marches and assemblies are within the ambit of the First Amendment."

In this light it will not do to say, as Appellants suggest, Appellants' Brief, p. 22, that because the Court of Crim-

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[15] It is noteworthy that a major reason for the three-judge court's abstention in *Zwicker*, to wit, the possibility of obtaining state declaratory relief is here unavailable. In Texas, declaratory and injunctive relief against an unconstitutional statute is not available unless "its enforcement invades a vested property right." *Kent Hotel Operating Co.* v. *Wichita Falls*, 141 Tex. 90, 170 S. W. 2d 217, 219 (1943); *Flowers* v. *Woodruff*, 200 S. W. 2d 178 (1947).

inal Appeals of Texas has limited conviction for use of "loud and vociferous language" to conduct "which creates so great an amount of noise that it was calculated to disturb the peace and tranquility of . . . persons in a public place" that the statute is not unconstitutional. Today's demonstrations and protests are on occasions conducted loudly and vociferously but properly do not lose the protection of the First Amendment "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *City of Chicago, supra,* 337 U. S. at 4. No such showing was made here as it cannot be made. This Court is, therefore, urged to affirm the decision of the court below.

POINT III

There is no procedural defect within the terms and intent of 28 U. S. C. §2284 which divested the Court below of jurisdiction.

Contrary to appellants' assertion and the authorities they cite to support it, the provisions of 28 U. S. C. §2284 are *not* jurisdictional, but procedural, *Van Buskirk* v. *Wilkinson,* 216 F. 2d 735, 737 (9 Cir. 1954); *Lion Manufacturing Co.* v. *Kennedy,* 330 F. 2d 833, 840 (D. C. Cir., 1964); see *Ex parte Poresky,* 290 U. S. 30, 54 S. Ct. 3, 78 L. Ed. 132 (1933); see also *National Council, etc.* v. *Caplin,* 224 F. Supp. 313, 314 (D. C., 1963).

The two earlier decisions relied upon by appellants are inapposite. See Defendants' Motion for New Trial, Appendix, pp. 94 *et seq. Crescent Manufacturing Company* actually ruled upon another point and the material quoted

therefrom at page 2 of Defendants' Motion for a New Trial is pure dictum. *Arneson* v. *Denny* decided only that an application for an interlocutory injunction would be dismissed because the court felt that the notice that was given was insufficient; however, this finding did not prevent the court from finally deciding the case in a separate opinion reported at 25 F. 2d 988.

It is significant, we think, that in each of these cases the claimed defect in procedural steps was called to the courts' attention prior to decision. Had the oversight in the instant case been raised by appellants before hearing, appropriate steps could have been taken by the Clerk of the Court to give the notice. Failure to raise the point constitutes, we submit, waiver.

Moreover, failure to give special formal notice has in no way harmed appellants and the purpose of the §2284 provision has clearly been served. *Consolidated Freight Lines* v. *Pfost,* 7 F. Supp. 629, 630 (D. C. Idaho, 1934) points out that the purpose of the statutory provisions then in effect is "so that the state's interest may be protected . . .". Clearly the vigorous representation of the appellants herein by the Attorney General was designed to protect that interest. The Attorney General of Texas is the lawyer not only for the State of Texas as a political entity but also for the Governor, Article IV, Section 22, Constitution of the State of Texas; Article 4399, V. A. C. S. Under these circumstances, it is difficult to see what additional purpose or function could be served by giving notice directly to the Governor.

If, however, the Court should determine that compliance with the notice provision is jurisdictional, contrary to the authorities and argument presented above, we suggest that it would be appropriate to withdraw the opinion heretofore

rendered, direct the Clerk of the Court to give the notice and, if the Attorney General insists on its, hold another hearing and then reissue the opinion.

CONCLUSION

The core of appellants' argument, simply stated, is that with the dismissal of the State criminal charges initially filed against appellees, the appellants instantly divested the federal court of jurisdiction over appellees' complaint for injunctive and declaratory relief. As the court below correctly noted, dismissal of the pending criminal charges mooted that portion of the action seeking injunctive relief against those prosecutions but was in no way directed toward or effective as regards the requests for declaratory and injunctive relief against future prosecutions. That decision was consonant with this Court's most recent cases concerning the scope of federal power in an action wherein facial unconstitutionality of a statute with resulting chilling effect on expression is alleged.

The court below stayed its mandate pending possible remedial state legislation. Such legislation not having been passed, the case should be remanded to court below for further proceedings consistent with that court's prior opinion.

Respectfully submitted,

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